an objective review of their performance, measured for "reasonableness under prevailing professional norms," *Strickland*, 466 U.S., at 688, 104 S.Ct. 2052, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time,"*id.*, at 689, 104 S.Ct. 2052. A review of the defense counsel's decisions confirm that they were not familiar with the law and the facts and there is no logical tactical reason for the defense counsel's actions.

The defense counsel was seriously deficient in that he did not move for a mis-trial when the Military Judge accepted and considered Prosecution Exhibit Number 4 which contained information concerning the petitioner's refusal to take a polygraph test. This is in violation of M.R.E. 707, which has previously been upheld by this Court. *United States v. Scheffer*, 523 U.S. 303, (1998). Here the polygraph evidence was absolutely barred by the Military Rules of Evidence. The Military Judge had accepted the exhibit into evidence, read it and considered it. He later stated that he would not consider the evidence, but as discussed *supra* given the peculiarities of human behavior and the findings entered, it is apparent that he considered the evidence. The only way of assuring that the trier of fact was neutral was for the court to grant a mis-trial. Since the Miliary Judge does not have a *sua sponte* duty to grant a mis-trial, he can only do so upon a timely motion by the defense counsel. The failure of defense counsel to make such a motion was error and prejudicial to the appellant. There was no tactical reason to not move for a mis-trial. The defense already had an opportunity to observe part of the government's case. They would have been little possibility of additional surprise. The convening authority may have decided not to re-refer some or all of

the charges. A mis-trial would have worked solely to the advantage of the defense.

The admission of Prosecution Exhibit 1, was also error. The defense counsel failed to object to the admission. Prosecution Exhibit 1 was a purported statement that in reality was a series of questions and answers rather than a narrative authored by the accused. The questions were asked by a representative of the Army Criminal Investigation D'vision and responded to by the appellant. This exhibit was a police interrogation. It consists wholly of the verbatim transcript of that interrogation. Under military law, such an interrogation transcript is not admissible as a substantive exhibit. *United States v. Powell*, 17 M.J. 975, 976 (A.C.M.R. 1984). Even if the Military Judge ruled some statement qualified as admissions, the remainder of the statements should have been redacted. Instead, the record of the interrogation, including the agent's leading questions, was admitted as substantive evidence and presumably considered by the trier of fact.

Here prejudice was obvious. Introduction of the statement was cumulative of Owens' testimony and a violation of M.R.E. 403. It had little probative value and the leading questions were prejudicial. Prejudice went beyond the mere fact that repetitive information was used to bolster the testimony of Owens. The exhibit was a tangible object that could be taken into the deliberation room and read or re-read to bring home the assertions of the government. The government asked the Military Judge, acting as fact-finder, to re-read the exhibit. Admission of this prejudicial document committed plain error.

Again there was no tactical reason for not making

an objection. The defense team was not familiar with the appropriate Army jurisprudence, such as *Powell, supra.*, which could have prevented the exhibit from being admitted. The exclusion of the document would only have benefitted the petitioner.

Additionally, the defense counsel failed to object to uncharged misconduct being admitted in contravention of M.R.E. 404(b). In the case of Theresa Moore's testimony, this included the assertion that appellant moved her hand towards his groin. No notice of this charged misconduct was ever provided as required by M.R.E. 404(b). There were other examples of uncharged misconduct being admitted into evidence without prior notice. Witness Josh Haney testified that appellant had dropped Dawn Marrow on him and said "[d]o your thing" in an apparent reference to sexual activities. In the context this could be interpreted as indecent language. No notice was provided. Karla Haase testified for the first time at trial that appellant had rubbed up against her and inflicted bruises upon her in an obvious attempt to bootstrap a showing of "harm." No notice of his uncharged misconduct was provided. This evidence should not have been considered by the trier of fact but it was admitted without objection.

Again, there was no advantage to the defense in failing to object. The uncharged misconduct painted a heinous picture of the petitioner, who, in reality, was a rather boorish and goofy young man who thought he was being funny. By allowing this uncharged misconduct to be considered by the trier of fact, the defense counsel failed in their duty to paint the petitioner in a less negative light. Here the defense was obviously unaware of the requirements of M.R.E. 404(b). Had they been

aware of this most basic rule, they surely would have objected.

Entering into stipulations that were detrimental to appellant also constituted error on the part of the defense counsel. Prosecution Exhibit #2, a stipulation of expected testimony by Rafael Verimissio, contained damaging information that was prejudicial to the appellant. Prosecution Exhibit 3 was another stipulation of expected testimony of Rafael Verimissio. Entering into this stipulation was even more erroneous since it was an opinion in support of the truthfulness of Karla Haase, one of the chief witnesses against the accused. The defense could have and should have forced the government to produce the witnesses so that their story could be tested by cross-examination. Lack of proper preparation, in the instant case, resulted in poor performance.

An accused cannot be forced to present the testimony of a material witness on his behalf by way of stipulation. *United States v. Thornton, supra,* 24 C.M.R. at 259. Thus the defense should have refused to enter into the stipulation and demanded production of Verimissio for confrontation and cross-examination or in the alternative the suppression of his testimony.

These two stipulations primarily addressed the conduct encompassed Charge I specifications 4 and 12. Notably, the Military Judge found appellant guilty on both specifications. The defense was not able to cross-examine this witness, as they were able to do effectively with other witnesses. By entering into the stipulation the un-contested testimony was accepted into evidence It was obvious the findings that the Military Judge considered and gave heavy weight to this unrebutted

testimony.

To a large extent, the lack of professional expertise, the improper preparation and the inadequate investigation are endemic to the military justice system. In order to exercise "due diligence" the attorney must be competent to act diligently. This is often a flaw in the military justice system, since trial defense counsel are assigned in their first tour of duty and possess little if any criminal trial experience. A circumstance that needs to be examined is the experience and the ability of the young JAG trial defense counsel, who operating on his or her own, usually without an investigator, tries to prepare a defense. In judging whether due diligence has occurred, the court must evaluate the defense team as to whether they were capable of exerting more diligence than they did. Here, the defense team does not have the training or the tools that they need to achieve greater diligence.

Military defense counsel are assigned to far flung Army posts without adequate supervision. The Staff Judge Advocate, usually a Colonel, supervises the Trial Counsel but not the defense counsel. These young officers are left adrift while trying to cope with a massive case load that is often aggravated by gapped billets and a steep learning curve.

While defense counsel certainly did a credible job in many areas, they failed to maintain proper control over evidentiary matters. By analogy, they played an excellent aggressive hockey game with their goalie on the bench. Better attention to evidentiary matters would have resulted in a full acquittal or at least a higher number of acquittals. In a system that institutionalizes ineffective assistance of counsel, the defense attorneys

were unable to properly prepare themselves for the trial. This resulted in an erroneous conviction. This Court should use its supervisory authority to examine the military justice system in the context of whether effective assistance of counsel is being provided to those young men and women who are defending our way of life.

II The Military's No Contact Order Was an Undue Burden on Petitioner's Right to Marry and Raise a Family and Contributed to the Hostile Attitude of His Spouse and Her Decision to Testify Against Him

Appellant, like any other American, has a fundamental right to marry and raise a family. *Griswold v. Connecticut*, 381 US 479 (1965). *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, (1942); and a fundamental right to privacy. *Roe v. Wade*, 410 U.S. 113 (1973). This right has been most recently upheld in *Lawrence v. Texas*, 123 S.Ct. 2472 2003 WL 21467086 (2003). The court below has decided this matter in a way that conflicts with the decision of the Supreme Court of the United States and other federal courts.

In the instant case, appellant's interaction with his wife was curtailed by the military through a non contact order. There was no reason for this order. The spouse was not a victim of spousal abuse and there was no allegation of spousal abuse. For months he was not allowed to pursue a normal relationship with his wife. The couple has now divorced, in part because of the illegal and unconstitutional government interference in the marital relationship.

While admittedly, the exigencies of military service sometimes result in separation from home and

family, there is no place in this country for the government to arbitrarily enforce family separation.

The Army has recognized in *United States v. Wagner*, 39 M.J. 832, 833-34 (A.C.M.R. 1994) that family rights are more than just privileges that can be "treated as lightly as a trip off-post for the barracks-bound soldier."

Since the actions of the government have unduly burdened the petitioner's fundamental right to marry and raise a family, this court must give strict scrutiny to their actions. "Strict judicial scrutiny" also is applied when the classification affects a "fundamental right." *United States v. Houston* 12 M.J. 907, 909 (N.M.C.M.R. 1982). In order to prevail, the government must show a compelling interest, narrowly tailored to accomplish its purpose. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097 (1995). Here the government failed to show any compelling interest or that the action taken was narrowly tailored to accomplish the purpose of the interest asserted. Since this matter involves a fundamental Constitutional right, actual prejudice need not be shown. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Consequently, the court below should have fashioned an appropriate remedy.

Admittedly, fashioning a remedy for this usurpation of fundamental right in the pre-trial period is difficult. It does not have any bearing on the actual guilt or innocence of appellant, but it certainly acted to impose an illegal cruel and unusual punishment upon the accused. Mental pain may be construed as cruel and unusual punishment. *United States v. Kinsch* 54 M.J. 641, 649 (A.C.C.A 2000). While convicted prisoners do not

have a fundamental constitutional right to visitation with family, *Bazzetta v. McGinnis* 124 F.3d 774, 779 (6th Cir. 1997), SSG Crousser was not convicted of anything at that particular time. Thus the deprivation of family contact was a violation of a fundamental right and constituted cruel and unusual punishment. Pre-trial detainees must have the right to kiss their wife. *Rhem v. Malcom*, 371 F.Supp. 594, 626 (S.D.N.Y) *aff'd* 507 F.2d 333 (2d Cir. 1974).

Additionally, in the instant case, the wife became a witness against her husband. For several months, the government had sole access to the wife and worked steadily to turn he against her husband. She was allowed to hear only one side of the story. This undermines serious public policy issues that support the preservation of the spousal relationship. The fact that the actions here eventually led to divorce underscore the need to prevent these overbroad types of no contact order.

Since the governmental deprivation led to the wife testifying against her husband, the conviction should be set aside and returned for a rehearing pursuant to 10 U.S.C. § 863 in which the wife's testimony would be suppressed.

III The Military Judge Violated the Due Process Clause of the Fifth Amendment to the United States Constitution in Not Producing the Defense Expert Witness as a Live Witness

"The Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.' " *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, (1986) The right of an accused in a criminal trial to due

process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-- a right to his day in court--are basic in our system of jurisprudence.... " *Id.* (quoting *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499 (1948)).

The Military Judge violated the petitioner's Sixth Amendment rights by failing to produce as a live witness a key expert who would have supported a major defense theory, that the initial interview by Ms. Rosencrans of the teen-aged witnesses was suggestive and would have resulted in "group contagion" and a confabulation of their testimony. When Dr. Dyer was finally granted as a witness, the defense requested that the trial be continued until she arrived. The basis of the continuance was to allow their expert to view the testimony of Rosencrans and other government witnesses, including the complaining witnesses. The Military Judge denied this request. This was error. 10 U.S.C. § 840 and R.C.M. 906(b)(1) authorize continuances whenever there is good cause. M.R.E. 703 indicates that witness unavailability is a legitimate reason for a continuance. Here the trial would have been delayed only a short time while the government arranged for Dr. Dyer's transportation. Inconvenience is not a basis for denying a continuance and it does not out weigh the accused's right to a fair trial. *United States v. Andrews*, 36 M.J. 922, 925 (A.F.C.M.R. 1993); *United States v. Furgason*, 6 M.J. 844 (N.M.C.M.R. 1979).

By depriving the defense of Dr. Dyers testimony as to the suggestibility of the actual interview techniques

used by the children's interrogators, the Military Judge prevented the defense from attacking the interview techniques. It is well settled that such techniques can taint the statements and even alter the memory of the interviewee. *See, e.g.* Feher, *The Alleged Molestation Victim, the Rules of Evidence and the Constitution; Should Children Really Be Seen and Not Heard*, 14 AM. J. CRIM. L. 227, 228-229 (Spring 1987); Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pre-Trial Interrogation of Child Witnesses*, 35 ARIZ L. REV. 927 (Winter 1993). *New Jersey v. Michaels*, 625 A.2d 489 (N.J. Super. 1993).

Thus the actions of the court below sustained a trial court action that had a substantial and injurious effect or influence in determining the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S.Ct. 1710 (1993).

To make matters worse, the Military Judge then bullied defense counsel into agreeing to a stipulation of facts that would be discussed by Dr. Dyer. There is no requirement that the defense enter into any stipulation absent a pre-trial agreement. The defense should have refused to enter into the stipulation of fact and if necessary sought extraordinary relief from this court. A live witness is a more compelling advocate than a piece of paper and the trier of fact cannot question a piece of paper for clarification. Any confusion goes uncontested and misunderstanding becomes fact. In contrast a stipulation tends to be forgotten as soon as it is read. This is buttressed by the fact that the defense never referred to group contagion in their closing and only mentioned Dr. Dyer twice. The government did not even refer to the issue.

The discussion to R.C.M. 811(b) clearly states that "the military judge should not accept a stipulation if there is any doubt of the accused's or any other party's understanding of the nature and effect of the stipulation." Additionally, M.R.E. 811(c) requires the Military Judge to ensure that all parties consent to the stipulation. Here the record shows that the defense counsel did not consent to the stipulation, it was forced upon them. Additionally, the record does not contain the consent of the accused. "An accused cannot be forced to present the testimony of a material witness on his behalf by way of stipulation or deposition." *United States v. Thornton*, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957). This is not a case like *United States v. Sweeney*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964) where a stipulation was the only means of receiving the evidence. Here a continuance was an option and the Military Judge should have granted it.

The error here was compounded by the failure to reduce the stipulation to writing. Although the Military Judge recited it on the record, the stipulation should have been submitted as an Exhibit for the Judge to review during deliberations. While M.R.E. 811(a) on its face would seem to allow oral stipulations, the jurisprudence disagrees. In *United States v. Eiland*, 39 M.J. 566, 569 n. 4. (N.M.C.M.R. 1993) the Navy Court found that a stipulation that has not been reduced to writing is simply an offer to stipulate. Certainly the better process is to reduce the stipulation to writing and to allow the trier of fact to review the matter as an exhibit. Appellant submits that as a matter of due process, an oral stipulation is improper. Absent such a writing, there was merely an offer to stipulate. *Id.*.

The decision of the courts below ignored the dictates of the jurisprudence of this court and the Manual

for Courts-Martial. It further constitutes a departure from the accepted and usual proceedings in the course of judicial proceedings. Thus it presents an important issue of law that must be decided by this court. The Army and Navy courts have disagreed on their application of the law governing stipulations and the Court of Appeals for the Armed Forces has abrogated its responsibility. Accordingly this Court must resolve the issue by setting aside the convictions and ordering the matter returned for a rehearing pursuant to 10 U.S.C. § 863 with the requirement that Dr. Dyer or a similar defense expert must be produced.

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Armed Forces.

Respectfully Submitted,

John B. Wells
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985-641-1855

United States Court of Appeals
for the Armed Forces
Washington, D. C. 20442-001

UNITED STATES,)	USCA Misc. Dkt. No. 05-0329/AR	
Appellee	) Crim. App. Dkt. No. 20010587	
v.	)	ORDER
Bruce E. CROUSSER,	)	
Appellant	)	

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, it is by the Court this 9th day of August, 2005,

ORDERED:

That said petition be, and the same is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Army
Counsel for Appellant (WELLS, Esq.)
Counsel; for Appellee (WIGGERS

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before

HARVEY, JOHNSON and SCHENCK
Appellate Military Judges

UNITED STATES, Appellee

v.

Staff Sergeant, BRUCE E. CROUSSER
United States Army, Appellant

ARMY 20010587

United States Army Maneuver Support Center and Fort Leonard Wood
Robert F. Holland, Military Judge
Colonel Donald G. Curry, Jr., Staff Judge Advocate

For Appellant: John B. Wells, Esquire (argued)(on brief and reply brief); Captain Karen W. Riddle, JA; Captain Eilin J. Chang, JA.

For Appellee: Captain Edward E. Wiggers, JA (argued); Colonel Steven T. Salata, JA; Lieutenant Colonel Mark L. Johnson, JA; Major Natalie A. Kolb, JA (on brief).

18 January 2005

DECISION

Per Curiam:

On consideration of the entire record, including

consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

MALCOM H. SQUIRES, JR.
Clerk of Court

United States Court of Appeals
for the Armed Forces
Washington, D. C. 20442-001

UNITED STATES,	)	USCA Misc. Dkt. No. 05-0329/AR
Appellee	)	Crim. App. Dkt. No. 20010587
v.	)	ORDER
Bruce E. CROUSSER,	)	
Appellant	)	

On consideration of appellant's petition for reconsideration of the order of the Court issued on August 9, 2005, it is, by the court, this 9th day of September, 2005,

ORDERED:

That said petition for reconsideration is hereby denied.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Army
Counsel for Appellant (WELLS, Esq.)
Counsel; for Appellee (WIGGERS)

TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

U. S. Constitution, Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just
compensation.

U. S. Constitution, Amendment VI. Jury trials for crimes, and procedural rights.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

10 U.S.C. § 840. Art. 40. Continuances

The military judge or a court-martial without a military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

10 U.S.C. § 863. Art. 63. Rehearings

Each rehearing under this chapter shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence may be approved, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory. If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.

Military Rule of Evidence Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the

danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Military Rule of Evidence Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided, that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Military Rule of Evidence Rule 707. Polygraph Examinations

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

Rule for Court-Martial 703. Rule 703. Production of witnesses and evidence

(a) In general. The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.

(b) Right to witnesses.

(1) On the merits or on interlocutory questions. Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.

(2) On sentencing. Each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(e).

(3) Unavailable witness. Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

Rule for Court-Martial Rule 811. Stipulations.

(a) In general. The parties may make an oral or written stipulation to any fact, the contents of a document, or the expected testimony of a witness.

(b) Authority to reject. The military judge may, in the interest of justice, decline to accept a stipulation.

(c) Requirements. Before accepting a stipulation in evidence, the military judge must be satisfied that the parties consent to its admission.

(d) Withdrawal. A party may withdraw from an agreement to stipulate or from a stipulation at any time before a stipulation is accepted; the stipulation may not then be accepted. After a stipulation has been accepted a party may withdraw from it only if permitted to do so in the discretion of the military judge.

(e) Effect of stipulation. Unless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto. The contends of a stipulation of expected testimony or of a document's contents may be attacked, contradicted, or explained in the same way as if the witness had actually so testified or the document had been actually admitted. The fact that the parties so stipulated does not admit the truth of the indicated testimony or document's contents, nor does it add anything to the evidentiary nature of the testimony or document. The Military Rules of Evidence apply to the contents of stipulations.

(f) Procedure. When offered, a written stipulation

shall be presented to the military judge and shall be included in the record whether accepted or not. Once accepted, a written stipulation of expected testimony shall be read to the members, if any, but shall not be presented to them; a written stipulation of fact or of a document's contents may be read to the members, if any, presented to them, or both. Once accepted, an oral stipulation shall be announced to the members, if any.

Rule for Court-Martial 906(b)(1). Rule 906. Motions for appropriate relief

. . .

(b) Grounds for appropriate relief. The following may be requested by motion for appropriate relief. This list is not exclusive.

(1) Continuances. A continuance may be granted only by the military judge.